Cornell Law Review

Volume 64
Issue 6 *August 1979*

Article 5

Mutuality of Estoppel and the Seventh Amendment: The Effect of Parklane Hosiery

James G. Hazard

Jonathan C. Thau

Donald Arthur Winslow

NOTE

MUTUALITY OF ESTOPPEL AND THE SEVENTH AMENDMENT: THE EFFECT OF PARKLANE HOSIERY

In *Parklane Hosiery Co. v. Shore,*[1] plaintiff proffered a prior equitable judgment, to which he was a stranger, to estop the relitigation by defendants of certain issues in an action at law. The Supreme Court upheld this offensive use of collateral estoppel. Further, the Court held that the estoppel did not violate defendants' seventh amendment right to jury trial. This Note examines the practical implications of the first holding, and the wisdom and historical validity of the second.

I

COLLATERAL ESTOPPEL: AN HISTORICAL PERSPECTIVE

Terminology concerning judgments can be confusing. Some courts have used the term "res judicata" broadly to include both merger or bar of a single cause of action and issue preclusion on a different cause of action.[2] More precise courts employ "res judicata" narrowly to refer to "a judgment on the merits in a prior suit [that] bars a second suit involving the same parties or their privies based on the same cause of action."[3] These latter courts employ "collateral estoppel," in contrast, when "the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action."[4] This Note will use

---

[1] 99 S. Ct. 645 (1979).

[2] Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955); Engelhardt v. Bell & Howell Co., 327 F.2d 30, 31 n.1 (8th Cir. 1964).

[3] Parklane Hosiery Co. v. Shore, 99 S. Ct. at 649 n.5.

[4] *Id.* Professor Vestal used the term "claim preclusion" to refer to merger or bar of a cause of action by prior litigation and "issue preclusion" to refer to the preclusive effect given the determination of a specific issue in prior litigation. Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 IOWA L. REV. 27, 27-28 (1964). *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 61 ("Dimensions of 'Claim' for Purposes of Merger or Bar"), § 68 ("Issue Preclusion—General Rule") (Tent. Draft No. 1, 1973). In conformity with common usage, however, this Note will use "collateral estoppel" rather than "issue preclusion."

By any name, collateral estoppel is an attractive device. It may save litigants time, effort, and expense, and help reduce court congestion. *See, e.g.,* Parklane Hosiery Co. v. Shore, 99 S. Ct. at 694; Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation,

this more precise terminology. In addition, this Note will describe a plaintiff's invocation of collateral estoppel as "offensive use" and a defendant's invocation as "defensive use."[5]

Within this framework, mutuality of judgment was a traditional prerequisite to use of collateral estoppel. Although "[t]he mutuality rule was probably never a solid wall [and] exceptions were created under the pressure of the public interest in an end to litigation,"[6] the general rule was that a party not bound by a judgment could not use determinations from that judgment in a later action against one who was bound.[7]

---

402 U.S. 313, 334-49 (1971) (devoting 15 pages to staggering expense of patent litigation and approving defensive use of collateral estoppel).

[5] According to the *Parklane Hosiery* Court:

> [O]ffensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.

99 S. Ct. at 649 n.4.

[6] Graves v. Associated Transp., Inc., 344 F.2d 894, 897 (4th Cir. 1965). *See also* Lober v. Moore, 417 F.2d 714, 717-21 (D.C. Cir. 1969). The notes to the *Restatement (Second) of Judgments* observe that mutuality "never enjoyed entire acceptance" and was "limited by a strong predisposition to find 'privity'. . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note at 98 (Tent. Draft No. 2, 1975). Early treatises also mention exceptions to mutuality. *See* J. BENTHAM, *The Rationale of Judicial Evidence,* in 7 THE WORKS OF JEREMY BENTHAM 171 (J. Bowring ed. 1843); 1 A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 159 (4th ed. 1892); S. HARRISON, EVIDENCE 47-48 (London 1825).

The best-documented exceptions to the mutuality rule were suits by the same plaintiff against closely related defendants. *See* Brobston v. Darby Borough, 290 Pa. 331, 339-41, 138 A. 849, 851-52 (1927) (joint tortfeasors); Portland Gold Mining Co. v. Stratton's Independence, Ltd., 158 F. 63, 65-69 (8th Cir. 1907) (lessor-lessee); Marler v. Ayliffe, Cro. Jac. 134, 79 Eng. Rep. 117 (K.B. 1607) (dictum) (joint defendants); Ferrers v. Arden, Cro. Eliz. 668, 78 Eng. Rep. 906 (C.P. 1599) (master-servant).

Other cases diverged further from the mutuality rule, even when there was no close relationship between the parties. *See* Whately v. Menheim, 2 Esp. 608, 170 Eng. Rep. 906 (N.P. 1797), *discussed in* notes 74-77 and accompanying text *infra.* The reasoning in Tiley v. Cowling, 1 Ld. Raym. 744, 91 Eng. Rep. 1398 (N.P. 1702) (Holt, C.J.), suggests that that judgment would bind the defendant in a subsequent suit by a stranger. It is unclear, however, whether collateral estoppel or evidentiary principles were the basis of the decision. *Compare* S. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 252 (3d ed. New York 1823) ("It is more difficult to explain [*Whately* and *Tiley*], which appear not to be consistent with the general [mutuality] rule.") *with* F. BULLER, AN INTRODUCTION TO THE LAW, RELATIVE TO TRIALS AT NISI PRIUS 232a. n. (a) (7th ed. London 1817) ("the verdict was not given in evidence, as the *verdict of a jury on any particular point,* but as evidence of a confession on record to lay a ground for proving what a deceased witness had sworn") (emphasis in original); 2 I. ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS *738; *and* T. PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 39 n.(d) (2d ed. Philadelphia 1806).

[7] *See, e.g.,* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912) ("It is a principle of general elementary law that the estoppel of a judgment must be mutual"); 2 H. BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 548 (2d ed.

While some commentators defended the general rule and its traditional exceptions,[8] others expanded the theory underlying the exceptions and vehemently attacked the doctrine as wasting judicial resources and lacking a logical rationale.[9] During this century, these criticisms bore fruit when an increasing number of courts rejected the rule.[10] The earliest cases rejecting mutuality

---

(1902); 1 A. FREEMAN, *supra* note 6, § 159; T. PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 27 (Philadelphia 1802). As recently as 1942, the *Restatement of Judgments* proclaimed the general rule of mutuality:

> Except as stated in §§ 94-111, a person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered . . .
>
> . . . .
>
> (b) is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action.

RESTATEMENT OF JUDGMENTS § 93 (1942).

[8] Some commentators defended the mutuality rule on fairness grounds—a party should not be bound by a judgment that does not bind his prospective adversary. *See* 1b MOORE'S FEDERAL PRACTICE § 0.412[1], at 1809-12 (2d ed. 1965); Moore & Currier, *Mutuality and Conclusiveness of Judgments,* 35 TUL. L. REV. 301, 308-11 (1961); Seavey, *Res Judicata With Reference to Persons Neither Parties nor Privies—Two California Cases,* 57 HARV. L. REV. 98, 105 (1943). Another commentator defended mutuality by arguing that its abandonment would wreak disproportionate hardship on a party who litigated beneath his capability in the first action:

> [T]he law takes cognizance of the frailties of human nature and realizes that, even in litigation, one, because of consideration for his opponent or for other reasons personal to himself, may not desire either to establish . . . his position to the utmost, and that, for purposes of the particular case, he may admit facts or fail to meet evidence, which he would combat as against another opponent.

Von Moschzisker, *Res Judicata,* 38 YALE L.J. 299, 303 (1929).

[9] J. BENTHAM, *supra* note 6, at 171; Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine,* 9 STAN. L. REV. 281, 284-85 (1957).

[10] The wall of mutuality suffered isolated cracks in earlier years (*see, e.g.,* United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925) (judgment in prior divorce action conclusive of facts in subsequent naturalization action by government against defendant in divorce proceeding)) but the California Supreme Court made most significant breach in Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942) (Traynor, J.). *Bernhard* involved defensive use of collateral estoppel. Although the case might have come within a special relationship exception to the mutuality rule (*see* Zdanok v. Glidden Co., 327 F.2d 944, 954 n.15 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964)), Justice Traynor's sweeping language foreshadowed the doctrine's general demise: "No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend." 19 Cal. 2d at 812, 122 P.2d at 895. In Bruszewski v. United States, 181 F.2d 419 (3d Cir.), *cert. denied,* 340 U.S. 865 (1950), the leading federal case of the era, the court, upholding defensive use of collateral estoppel, concluded that "no unfairness results here from estoppel which is not mutual. . . . [because] the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata.*" *Id.* at 421 (footnote omitted).

primarily concerned defensive use of collateral estoppel, but subsequent cases openly allowed offensive use.[11] In addition, the *Restatement (Second) of Judgments* adopted a liberal view of collateral estoppel absent mutuality that also minimized the distinction between offensive and defensive use.[12] In *Blonder-Tongue*

---

[11] Several considerations militate against offensive use of collateral estoppel. First, it does not necessarily promote judicial economy. Rather than exhaust his "day in court," a potential plaintiff may eschew consolidation with an ongoing suit against his prospective defendant. If the plaintiff in the ongoing suit prevails, the sideline plaintiff may then jump in and claim that the defendant is collaterally estopped by the findings against him. If the plaintiff in the ongoing suit loses, the sideline plaintiff would then be free to start bis own suit. *See* Reardon v. Allen, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1965). Second, because the defendant may have been forced to defend the first action in an inconvenient forum, it may be unfair to give findings from that action preclusive effect. *See* Parklane Hosiery Co. v. Shore, 99 S. Ct. at 651 n.15 ("If . . . the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted."). Third, "[a] defendant who lost against one multiple claimant may have been sued for nominal or small damages. Accordingly, his defense may have been perfunctory or in a doubtful or sympathetic . . . case the jury's conclusion might well amount to a 'compromise verdict.' " Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1036 (1967). Applying estoppel against a defendant who may have been unable to foresee a subsequent suit involving higher stakes seems unfair. *See* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 538-41 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) (passenger seeking $7,003,000 in damages denied estoppel against airlines that failed to appeal prior adverse judgment for $35,000). Fourth, it may be unfair to permit a plaintiff to estop a defendant with a judgment inconsistent with prior judgments in defendant's favor. *See* Currie, *supra* note 9, at 285-89.

Notwithstanding these potential hazards, a number of courts permitted offensive use. *See* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom.* United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); Gorski v. Commercial Ins. Co., 206 F. Supp. 11 (E.D. Wis. 1962); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601 (1967) ("the 'doctrine of mutuality' is a dead letter"). In addition, courts applied the findings of criminal trials against convicted persons in subsequent civil actions. *See* Breeland v. Security Ins. Co., 421 F.2d 918 (5th Cir. 1969); Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962).

[12] A party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person unless he lacked full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording him an opportunity to relitigate the issue.

RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975). The Reporter's Note to § 88 minimizes the distinction between offensive and defensive uses of collateral estoppel:

> There has been some hesitancy whether preclusion might be invoked "offensively," i.e., to determine an issue pertinent to the liability of one who is a defendant, particularly when he was also a defendant in the first action. . . . However, the distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between "offensive" as distinct from "defensive" issue preclusion, although a stronger showing that the

Laboratories v. University of Illinois Foundation,[13] the Supreme Court, stressing the expense of protracted litigation, allowed collateral estoppel absent mutuality. Although *Blonder-Tongue* involved defensive use, the Court's sweeping language suggested that it would sanction offensive use if presented with a proper case.[14]

II

PARKLANE HOSIERY CO. V. SHORE

In *Parklane Hosiery Co. v. Shore*,[15] the Supreme Court seized an opportunity to complete the job begun in *Blonder-Tongue*. The complex web of litigation began when stockholders of the Parklane Hosiery Company brought a class action suit under sections 10(b), 13(a), 14(a), and 20(a) of the Securities Exchange Act of 1934,[16] alleging that the defendant corporation and twelve of its officers, directors, and stockholders had issued a materially false and misleading proxy statement in connection with a "going private" merger.[17] The plaintiffs sought damages, recission of the merger, and recovery of costs.[18] Before trial of the private suit, the Securities and Exchange Commission (SEC) sought injunctive relief in a different district court against the same defendants based upon the same allegedly misleading proxy statement.[19] The judge in the SEC action held that the proxy

---

prior opportunity to litigate was adequate may be required in the former situation than the latter.

Id. at 99.

[13] 402 U.S. 313 (1970) (allowing alleged patent infringer to rely on prior adjudication of invalidity).

[14] The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue. . . . In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. . . . Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.

Id. at 328-29 (quoting Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952)).

[15] 99 S. Ct. 645 (1979).

[16] 15 U.S.C. §§ 78n(a), 78j(b), 78m(a), 78t(a) (1976).

[17] 99 S. Ct. at 648. The plaintiffs essentially alleged that the "going private" merger had been proposed to enable the president and controlling stockholder of Parklane to repay personal debts. *See* SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 481-82 (S.D.N.Y. 1976).

[18] 99 S. Ct. at 648.

[19] *Id.*

statement was materially false and misleading under section 14(a), but found future violations unlikely and denied an injunction.[20] The Second Circuit Court of Appeals affirmed.[21]

The private plaintiffs then moved for partial summary judgment on the issues determined in the SEC suit.[22] The defendants opposed the motion, arguing that because they had no jury in the SEC suit, application of estoppel would deprive them of their seventh amendment right[23] to a jury trial.[24] Relying on a Fifth Circuit case,[25] the district court denied plaintiffs' partial summary

---

[20] SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976). The court concluded that the challenged proxy statement was materially misleading in three respects. First, it failed to reveal that the primary goal of the proposed merger was to help Parklane's president pay personal debts. Second, it failed to reveal the possibility that a major real estate lease would be cancelled. Third, it failed to reveal that an appraisal of Parklane shares conducted in connection with the proposed merger was based upon inadequate and incomplete information.

[21] SEC v. Parklane Hosiery Co., 558 F.2d 1083 (2d Cir. 1977).

[22] Parklane Hosiery Co. v. Shore, 99 S. Ct. at 648.

[23] The seventh amendment provides in part: "In suits at common law . . . the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII.

[24] Brief for Petitioners at 6.

[25] Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971). *Rachal* arose following a bench trial in which the SEC obtained injunctive relief against corporate officers for diverse violations of the federal securities laws. Stockholders of the affected corporations then sued the same officers, alleging the same securities violations. Allowing offensive use of collateral estoppel, the district court granted the stockholders summary judgment as to liability. The Fifth Circuit reversed:

> In light of the great respect afforded in [recent Supreme Court cases] for a litigant's right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the [defendants] have lost their right to a trial by jury . . . because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party. . . . [H]ad [the plaintiffs joined in the SEC action the defendants] would have received a jury trial on the issue of liability. It hardly makes sense that [the plaintiffs] can now assume a position superior to that to which [they] would have been entitled if [they had been parties] to the prior action.

Id. at 64. For a more detailed discussion of *Rachal*, see Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971).

Rachal enjoyed a mixed reception. Several courts cited it approvingly. *See* Allegheny Airlines, Inc. v. United States, 504 F.2d 104, 111 n.7 (7th Cir. 1974) *cert. denied*, 421 U.S. 978 (1975); Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1182 (3d Cir. 1972); SEC v. Standard Life Corp., 413 F. Supp. 84, 86-87 (W.D. Okla. 1976); McCook v. Standard Oil Co., 393 F. Supp. 256, 259 (C.D. Cal. 1975).

Rachal received preliminary acceptance in the Second Circuit. One district court followed it. *See* Cannon v. Texas Gulf Sulphur Co., 323 F. Supp. 990, 993-94 (S.D.N.Y. 1971). Another seemed to approve it in dictum. *See* Essex Systems Co. v. Steinberg, 335 F. Supp. 298, 302 (S.D.N.Y.), *aff'd mem.*, 447 F.2d 1405 (2d Cir. 1971). The court of appeals, however, quickly demonstrated its dissatisfaction with *Rachal*. In SEC v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972), private plaintiffs, relying on *Rachal*, sought to intervene in an SEC injunctive action by arguing that failure to permit intervention would

judgment motion.[26] On interlocutory appeal, the Second Circuit reversed, holding that because the defendants had received a full and fair opportunity to litigate in the non-jury action, they were collaterally estopped from obtaining a subsequent jury trial of these same issues of fact.[27]

---

compel total relitigation of issues in their subsequent private action. Denying intervention, the court showed no deference to *Rachal,* finding it "preferable to require private parties to commence their own actions than to have SEC actions bogged down through intervention." *Id.* at 1240 n.5.

The Second Circuit's disapproval of *Rachal* became more apparent in Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973), *noted in* 41 BROOKLYN L. REV. 937 (1975). *Crane* held that a district court ordered on remand to award equitable relief might also award damages without impaneling a jury. Although *Crane* did not directly involve collateral estoppel, the court noted in dictum that it was "not at all sure that *Rachal* was correctly decided." 490 F.2d at 343 n.15. Finally, in Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974), *noted in* 1974 DUKE L.J. 970, the court, relying on the *Crane* dictum, issued a writ of mandamus ordering a district judge presiding over 15 related cases against the same defendant to try one of the cases set for jury trial before any of the cases set for bench trial. Since mandamus is an extraordinary remedy, the court's willingness to grant it to protect the defendant's seventh amendment right to a jury trial evidenced its belief that issues determined in a bench trial would collaterally estop the defendant in a subsequent jury trial.

[26] The district court's unpublished memorandum is reproduced in Shore v. Parklane Hosiery Co., 565 F.2d 815, 818 (2d Cir. 1977): "The within motion is denied. *Rachal v. Hill,* 435 F.2d 59 (5th Cir. 1970). So ordered."

[27] 565 F.2d at 818. Although the Second Circuit's broad application of offensive collateral estoppel fit well within the current trend (*see* notes 10-14 and accompanying text *supra*), the court clouded its analysis by suggesting in dictum that the defendants had waived their seventh amendment rights:

> Were there any doubt about the matter, it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs, either by seeking to expedite trial of the present action or by requesting [the trial judge] to order that the issues in the SEC case be tried by a jury or before an advisory jury.

Id. at 821-22 (footnote omitted).

In their brief before the Supreme Court, the defendants attacked this waiver rationale on three grounds. First, they noted "the well-established policy requiring SEC enforcement actions to be tried without being delayed by private litigation." Brief for Petitioners at 27. Second, relying on SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90 (2d Cir. 1978), they argued that they had no right to a jury trial in the SEC injunctive action. *Id.* at 31. Third, they argued that it would have been futile to have requested an advisory jury, since "[e]ven where an advisory jury is used, the facts are to be found by the court, Rule 52(a), FED. R. CIV. P., and the 'review on appeal is from the court's judgment as though no jury had been present.' " *Id.* at 32 (quoting American Lumbermen's Mut. Cas. Co. v. Timms & Howard, Inc., 108 F.2d 497, 500 (2d Cir. 1939)). Interestingly, the plaintiffs in their brief before the Supreme Court disclaimed reliance on the waiver theory: "Whether

Agreeing that the defendants had "received a 'full and fair' opportunity to litigate their claims in the SEC action"[28] the Supreme Court affirmed, definitively sanctioning offensive use of collateral estoppel.[29] Acknowledging the potential hazards of offensive use,[30] the Court eschewed blanket rules and "grant[ed] trial courts broad discretion to determine when it should be applied."[31] The Court warned, however, that as a "general rule . . . in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[32]

The court rejected the contention that according estoppel effect to the findings from the SEC suit would deprive the defendants of their seventh amendment right to a jury trial. Although the Court assumed that the absence of mutuality would have precluded collateral estoppel in 1791,[33] it found "no persuasive reason . . . why the meaning of the Seventh Amendment should depend on whether or not mutuality of parties is present."[34] Relying on several cases that had permitted limited encroachments

---

the Petitioners waived any right to a jury trial was and is unnecessary to the decision." Brief for Respondents at 33.

In its opinion, the Supreme Court totally rejected the waiver rationale:

> The Court of Appeals was mistaken. . . . The petitioners did not have a right to a jury trial in the equitable injunctive action brought by the SEC. Moreover, an advisory jury, which might have only delayed and complicated that proceeding, would not in any event have been a Seventh Amendment jury. And the petitioners were not in a position to expedite the private action and stay the SEC action. The Securities Act of 1934 provides for prompt enforcement actions by the SEC unhindered by parallel private actions. 15 U.S.C. § 78u(g).

99 S. Ct. at 655 n.24.

[28] 99 S. Ct. at 652.

[29] *Id.* at 651-55.

[30] *See* note 11 *supra*.

[31] 99 S. Ct. at 651 (footnote omitted).

[32] *Id.* at 651-52.

[33] " '[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791.' " *Id.* at 652 (quoting Curtis v. Loether, 415 U.S. 189, 193 (1974)).

[34] 99 S. Ct. at 654. The Court noted that:

> A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party. In either case, the party against whom estoppel is asserted has litigated questions of fact, and has had facts determined against him in an earlier proceeding.

Id.

upon the common law jury right,[35] the Court held that application of estoppel did not threaten the substance of the seventh amendment.[36] Dissenting, Justice Rehnquist maintained that "developments in the judge-made doctrine of collateral estoppel, however salutary, cannot, consistent with the Seventh Amendment, contract in any material fashion the right to a jury trial that a defendant would have enjoyed in 1791."[37]

III

THE FIRST HOLDING: OFFENSIVE USE OF COLLATERAL ESTOPPEL ABSENT MUTUALITY

The long-term trend toward broad application of collateral estoppel[38] amply presaged the result in *Parklane Hosiery*. Establishment of proxy violations in *Parklane Hosiery* left some issues for trial, but eliminated retrial of the false and misleading nature of the proxy solicitation,[39] saving all the litigants time and resources. Justice Rehnquist argued in his dissenting opinion that *Parklane Hosiery* presented a weak case for collateral estoppel because the need for jury determination of injury and damages rendered any savings in time minimal.[40] This argument strikes at

---

[35] Galloway v. United States, 319 U.S. 372 (1943) (directed verdict does not violate seventh amendment); Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) (retrial limited to ascertainment of damages does not violate seventh amendment); Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902) (summary judgment does not violate seventh amendment).

[36] 99 S. Ct. at 652-55.

[37] *Id.* at 655, 659-60.

[38] *See* notes 10-14 and accompanying text *supra*.

[39] "A private plaintiff in an action under the proxy rules is not entitled to relief simply by demonstrating that the proxy solicitation was materially false and misleading. The plaintiff must also show that he was injured and prove damages." 99 S. Ct. at 648 n.2.

[40] *Id.* at 664. According to Justice Rehnquist:

> [*Parklane Hosiery*] is an apt example of the minimal savings that will be accomplished by the Court's decision. As the Court admits, even if petitioners are collaterally estopped from relitigating whether the proxy was materially false and misleading, they are still entitled to have a jury determine whether respondents were injured by the alleged misstatements and the amount of damages, if any, sustained by respondents. . . . Thus, a jury must be impaneled in this case in any event. The time saved by not trying the issue of whether the proxy was materially false and misleading before the jury is likely to be insubstantial.

Id. In a footnote to his opinion, Justice Rehnquist further argued that "[m]uch of the delay in jury trials is attributed to the jury selection, *voir dire* and the charge." *Id.* at 664 n.24 (citing H. ZEISEL, H. KALVEN, & B. BUCHHOLTZ, DELAY IN THE COURT 79 (1959)).

The *Parklane Hosiery* facts actually undercut Justice Rehnquist's argument. The private plaintiffs began their suit in November 1974. Shore v. Parklane Hosiery Co., 565 F.2d 815, 816 (2d Cir. 1977). The SEC did not bring its suit until May 1976. *Id.* at 817. Yet the

offensive use of collateral estoppel in general rather than the particular result in *Parklane Hosiery*. Rarely will offensive use of collateral estoppel without mutuality determine all the issues in a case.

The *Parklane Hosiery* Court recognized that offensive use creates special dangers[41] and limited its application to instances where plaintiff could not easily have joined the prior action and defendant had a full and fair opportunity to litigate in the prior action.[42] The Court concluded that the *Parklane Hosiery* facts satisfied both prongs of this test. First, under section 21(g) of the Securities Exchange Act of 1934[43] the private plaintiffs could not have joined in the SEC suit without the agency's consent.[44] Second, several factors ensured that the defendants had received a

---

district court filed its opinion in the SEC injunctive suit in November 1976 (*id.*), before trial of the private suit. Given the glacial pace of the private litigation and the complex arguments that plaintiffs seeking to prove a proxy violation must marshal, it is naive to argue that application of estoppel in *Parklane Hosiery* would save only "insubstantial" time.

[41] 99 S. Ct. at 650-51. For a discussion of the possible dangers of offensive use, see note 11 and accompanying text *supra*.

[42] 99 S. Ct. at 651-52.

[43] 15 U.S.C. § 78u(g) (1976) provides in part: "[N]o action for equitable relief instituted by the [Securities and Exchange] Commission ... shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission."

[44] It is unlikely that private litigants will obtain such consent. In its amicus brief filed in *Parklane Hosiery*, the SEC left no doubt about its distaste for consolidation:

> [C]ourts should not require the Commission to await the resolution of private actions before advancing to trial in enforcement proceedings, and they should not impose any requirements that might unnecessarily delay trial of the Commission's suits. Private actions, often filed as class or derivative suits, may consume years for pretrial discovery alone. The Commission's ability to protect the public during this period would be seriously impaired if injunctive proceedings were postponed at the request of private litigants or delayed by requests for jury trials.

Amicus Brief of SEC at 30-31. Moreover, even before enactment of § 21(g) courts deferred broadly to the SEC's desire to avoid consolidation. In SEC v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972), the court noted that

> [t]he SEC's workload, despite its limited budget and staff, would be substantially increased if such intervention were allowed. Additional issues would have to be tried in the main action.... For example, a private party seeking damages would have to prove scienter and causation, elements of proof not required in an SEC injunction action.... Already complicated securities cases would become more confused and complex. The SEC can bring the large number of enforcement actions it does only because in all but a few cases consent decrees are entered. The intervention of a private plaintiff might tend to discourage or at least to complicate efforts to obtain a consent decree.

Id. at 1240 (citations omitted).

"full and fair opportunity" to litigate in the SEC suit. They had ample incentive to litigate vigorously. A subsequent trial involving the same issues was more than foreseeable; the defendants were already embroiled in the private suit.[45] In addition, given the seriousness of the charges they faced in the SEC action, they would hardly have mounted a perfunctory defense.[46] Further-

---

[45] 99 S. Ct. at 652 n.18.

[46] Securities "professionals"—underwriters, brokers, dealers, investment advisors, attorneys, and accountants—face devastating consequences when hit with SEC injunctions. A person who has been enjoined from future violations is disqualified from using the Regulation A small offerings exemption of the Securities Act of 1933 (*see* Securities Act Rule 252(c)(4), (d)(2), 17 C.F.R. 230.252(c)(4), (d)(2) (1978)) or from being associated with a registered investment company (*see* 15 U.S.C. § 80a-9(a) (1976)). Under § 15(b)(4)(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b)(4)(C) (1976), and § 15(b)(6), 15 U.S.C. § 78o(b)(6) (1976), the SEC may suspend or revoke the registration of a broker-dealer who has been enjoined from securities violations. Such a person is also subject to contempt citations for future violations. Moreover,

> [s]ince one of the major functions of injunctive actions brought by the Commission is the alerting of potential private plaintiffs to actionable violations of the securities laws, the defendants should be well aware of the possibility of multiple private suits at a later date. Thus, it is unlikely that the defendants would regard the injunction as unimportant and therefore fail either to defend the first suit vigorously or to appeal an adverse judgment.

Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions—Rachal v. Hill*, 71 COLUM. L. REV. 1329, 1338-39 (1971) (footnotes omitted).

The indirect effects of SEC injunctions can be even more serious. SEC Rule 2(e) provides in part:

> The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter. . . .
>
> . . . .
>
> (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or
>
> (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws . . . , or the rules and regulations thereunder.

17 C.F.R. § 201.2(e)(1) (1979) (citation omitted).

Entry of an SEC-initiated injunction against an attorney might prompt a Rule 2(e) suspension. The Second Circuit recently upheld the SEC's power under Rule 2(e). *See* Touche Ross Co. v. SEC, No. 78-6095 (2d Cir. May 10, 1979). Such a suspension might deprive an attorney of lucrative fees and result in adverse publicity. *See SEC Slap: Heavy Blow to Lawyers*, Nat'l L.J., Apr. 9, 1979, at 1, col. 4.

Adverse publicity alone may spell doom for attorneys and other securities professionals. The intangible factors that comprise "reputation" may spell the difference between failure and fortune:

> An SEC sanction is no less than a calamity for a securities lawyer.
>
> SEC sanctions have led to the ouster of law firm partners, the breakup of firms and even a lawsuit by a client who charged his lawyer was strong-armed into betraying harmful secrets. And a sanction can bring gnawing worries about wholesale client desertion as well as deprive a lawyer of lucrative opportunities in the future.

more, the plaintiffs were not trying to capitalize on an anomalous judgment in their favor. The SEC trial was the first involving the given issues.[47] Finally, the Court, finding "the presence or absence of jury as factfinder . . . basically neutral,"[48] concluded that the second action presented no procedural advantages over the first.[49]

Although the Court was unwilling to sanction offensive use of collateral estoppel without reservation, its decision will have enormous practical effects on securities litigation. Broad application of collateral estoppel is particularly appropriate in securities cases. Courts have long recognized that private damage suits provide an essential supplement to SEC enforcement actions.[50] Permitting private plaintiffs to rely on determinations obtained by the SEC will significantly lighten their task and increase the deterrent effect of both public and private penalties. Furthermore, securities

---

> Officials at the Commission are well aware of these costs. "There's a lot of soul-searching involved before the SEC will proceed," said . . . [the] New York branch chief of legal interpretation for the SEC. "We know we could be taking someone's livelihood away."

Id. The prejudicial effect of publicity stemming from SEC injunctions may be exacerbated by the Commission's use of the word "fraud" in a loose, nontechnical sense in connection with its enforcement proceedings. *See* Bialkin, *The Impact of Parklane Hosiery: A Change in Litigation Strategy,* Nat'l L.J., Feb. 26, 1979, at 22, col. 4. Although the SEC does not use the word, as does the common law, to imply an intent to deceive, the investing public may reasonably infer such a meaning.

"Nonprofessionals"—the defendant officers, directors, and stockholders of Parklane Hosiery Co., for example—may face SEC injunctions with slightly less terror. Corporate management is typically more interested in marketing goods or services than in cultivating a reputation for expertise and integrity in securities transactions. Nevertheless, management can hardly ignore the adverse effects publicity concerning an SEC injunction may have on business. In addition, companies hit with injunctions may have increased difficulty in borrowing money. *See* Brodsky, *The Frustration of Private Counsel: Uncertainties Favor the Commission,* 178 N.Y.L.J. 48 (1977). Moreover, litigation with the SEC can be enormously expensive and time consuming. *See SEC Slap: Heavy Blow to Lawyers, supra,* at 16, col. 3 (detailing one lawyer's consent to entry of permanent injunction against him after learning that "a defense would cost me $250,000 and would take up the next three to four years of my life"). Thus, if even "nonprofessional" defendants decide to bear the cost and increased publicity associated with fighting an SEC injunction, they will almost certainly litigate zealously.

[47] 99 S. Ct. at 652. For a more complete discussion of the hazards of permitting offensive use of collateral estoppel based upon prior inconsistent judgments, see Currie, *supra* note 9, at 285-89.

[48] 99 S. Ct. at 652 n.19.

[49] *Id.* at 652.

[50] *See, e.g.,* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 382 (1970); J.I. Case Co. v. Borak, 377 U.S. 426, 430-34 (1964).

litigation is often protracted;[51] any time saved by applying collateral estoppel should prove welcome.[52]

Unfortunately, *Parklane Hosiery* may also vest the SEC with power to coerce non-culpable defendants into settling enforcement actions.[53] Such defendants may fear the preclusive effects flowing from an unfavorable first judgment[54] and the SEC may succeed in establishing securities violations where private litigants would fail.[55] A defendant may rationally agree to the entry of a consent decree against him in the enforcement action, regardless of the merits of the action, in order to force private plaintiffs to

---

[51] *See* Amicus Brief of SEC at 2, 3, n.1:

> From 1973 through 1977, securities and commodities litigation in the federal courts represented between 1.5 percent and 2.3 percent of the total number of civil actions filed per year. During that same period, securities and commodities cases represented between 6.95 and 9.84 percent of the civil actions that had been pending in the district courts for three years or more. In addition, while only a small percentage (between .39 percent and .59 percent) of civil cases required 20 days or more for trial, approximately five times as many securities and commodities cases (between 1.4 percent and 3.28 percent) required more than 20 days for trial. Fully 13 percent of the civil trials lasting 20 days or longer were in securities or related actions.

[52] The time saved by applying collateral estoppel should not, however, be overrated. Even if the SEC succeeds in proving a violation of the securities laws a private plaintiff may still need to prove reliance, causation, and damages. All of these issues involve potentially complex, time-consuming problems of proof. Moreover, as the *Parklane Hosiery* Court acknowledged, such issues require the impaneling of a jury, itself a lengthy process. 99 S. Ct. at 648 n.2.

[53] *See* Balkin, *supra* note 46, at 22. *Practical Problems from Offensive Use of Collateral Estoppel*, 181 N.Y.L.J. 1, 2 (1979). Even before *Parklane Hosiery* the SEC achieved remarkable success in its enforcement actions: "Approximately 89 percent [641/715] of the defendants named in the Commission's injunctive actions between October 1, 1976, and September 30, 1977, settled their cases." Amicus brief of SEC at 16 n.11.

[54] In stockholder class action suits, for example, hundreds or even thousands of potential plaintiffs might benefit from favorable findings by the SEC.

[55] SEC lawyers may have greater expertise in securities litigation than private lawyers. The SEC also has great financial resources; private litigants, in contrast, may lack the resources to litigate vigorously over an extended period of time. *Cf.* Merrifield, *Investigations by the Securities and Exchange Commission*, 32 BUS. LAW. 1583 (1977):

> [I]t's not easy to fight the Federal Government even though the SEC . . . complains about the inadequacy of its budget. The fact is that when you go to court against the SEC you are going to court against the Federal Government, and there is no effective limit to the resources available in their behalf.

Id. at 1627 n.160 (remarks of Kenneth Bialkin, ABA Annual Convention). Moreover, the SEC is charged with the responsibility of safeguarding the public interest. Private litigants, in contrast, bring suits for their own pecuniary benefit. As a result, fact-finders may subconsciously give greater weight to allegations and evidence presented by the SEC. Finally, notwithstanding the severe ramifications of SEC sanctions (*see* note 46 *supra*), some courts may view such sanctions as less harmful to defendants than damages. If so, these courts may be willing in an SEC action to find a violation of the securities laws on a lesser showing of culpability.

prove independently the elements of their damage claim.[56] This consequence of *Parklane Hosiery* is not limited to SEC actions; the decision probably will enhance the ability of most agencies armed with prosecutorial powers to force both culpable and non-culpable defendants to capitulate.[57]

---

[56] One commentator has exhaustively catalogued the advantages of settlement:

> Adverse publicity comes out and frequently is dissipated at one time. Uncertainty, which can have adverse effects on shareholders and customers and inhibit the conduct of business, is removed; there is no purgatory between the institution of formal proceedings and final disposition of the matter. All proceedings, civil injunctive and possible administrative proceedings, may be disposed of at one time.
>
> In some cases it may be possible to negotiate the language and violations charged in the complaint and avoid some of the stinging and nonessential allegations and charges which might additionally stir up class action suits and which could have unfortunate ancillary effects. It may also be possible to eliminate some defendants who would otherwise be named. The very complete statements contained in papers supporting an SEC request for interlocutory relief can be avoided as can the possibility of an opinion filled with factual findings and legal analysis. Negotiating a settlement and consent decree also obviously allows the subject to negotiate the language of the consent; if the scope and language of the consent can be limited, adverse publicity and secondary repercussions and inhibitions to the conduct of business can be reduced. Since the defendant "neither admits nor denies" the allegations, there should be no collateral estoppel effect in subsequent proceedings, civil or criminal.

Merrifield, *supra* note 55, at 1626-27 (footnotes omitted). The collateral estoppel effect of consent decrees, however, is not completely settled. *See* note 60 *infra*.

[57] In one area—antitrust litigation—*Parklane Hosiery*'s impact may be more limited. The weight of authority holds that § 5(a) of the Clayton Act (15 U.S.C. § 16(a) (1976)), in providing that a judgment for the government in an antitrust suit, is prima facie evidence in a private suit, precludes offensive use of collateral estoppel in a private action. North Carolina v. Charles Pfizer & Co., 537 F.2d 67, 73-74 (4th Cir.), *cert. denied,* 429 U.S. 870 (1976); Purex Corp. v. Procter & Gamble Co., 308 F. Supp. 584, 589-90 (C.D. Cal. 1970), *aff'd,* 453 F.2d 288 (9th Cir. 1971), *cert. denied,* 405 U.S. 1065 (1972); United States v. Grinnell Corp., 307 F. Supp. 1097, 1098-99 (S.D.N.Y. 1969). Some courts and commentators have concluded that § 5(a) merely sets a minimum standard that courts can go beyond in giving the prior judgment conclusive effect. *See* Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176, 185 (E.D. Pa. 1976) ("It seems odd that a statutory provision which was enacted to strengthen antitrust plaintiffs should now be interpreted to make them worse off in many cases than they would bave been without the enactment."); Note, *The Use of Government Judgments in Private Anti-Trust Litigation,* 43 U. CHI. L. REV. 338, 374-75 (1976) ("it will be possible to achieve section 5(a)'s aim of aiding private enforcement of the antitrust laws only if the courts recognize that they may and should allow private antitrust plaintiffs to assert prior government judgments as collateral estoppel in subsequent actions."); Note, *Section 5(a) of the Clayton Act and the Use of Collateral Estoppel by a Private Plaintiff in a Treble Damage Action,* 8 U.S.F. L. REV. 74, 89 (1973) ("To continue to refuse to apply the common law doctrine of collateral estoppel to antitrust cases . . . accomplishes little more than creating 'a privileged class of law breakers' within the field of antitrust.") (footnote omitted). This latter argument has appeal because § 5(a)'s prima facie reference was originally enacted by a Congress that wanted to aid plaintiffs in avoiding the old mutuality requirement, yet feared that giving the prior judgment conclusive effect would

Parklane Hosiery will also have serious implications for administrative adjudications. The determinations of an agency acting in its judicial capacity generally receive collateral estoppel effect.[58] If the defendant had a procedurally adequate[59] opportu-

---

be an unconstitutional deprivation of due process. *See* Fleer v. Topps Chewing Gum, Inc., 415 F. Supp. 176, 184 (E.D. Pa. 1976); Note, *supra,* 8 U.S.F. L. REV. at 82.

Congress no longer questions the constitutionality of giving a prior judgment conclusive effect, yet it has refused repeatedly to change the prima facie language. *See* Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions,* 85 YALE L.J. 541, 550-54 (1976). Indeed, during consideration of amendments to § 5(a), members of Congress, fearing that broad preclusion would coerce defendants into settling before judgment, concluded that issues should remain open for a private suit. *See Hearings on H.R. 7905 (H.R. 8763) Before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary,* 81st Cong., 2d Sess. ser. 14, pt. 5, at 5-13 (1950).

Two days after the Supreme Court decided *Parklane Hosiery,* the Seventh Circuit adopted the view that § 5(a) preempts collateral estoppel because of Congress's refusal to change the prima facie language. Illinois v. General Paving Co., 590 F.2d 680, 682-3 (7th Cir. 1979). If the Seventh Circuit's view prevails *Parklane Hosiery*'s reach into the antitrust area will be limited.

[58] *See, e.g.,* United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); International Wire v. Local 38, Int'l Bhd. of Elec. Workers, 475 F.2d 1078 (6th Cir.), *cert. denied,* 414 U.S. 867 (1973); Texaco, Inc. v. Operative Plasterers Local 685, 472 F.2d 594 (5th Cir.), *cert. denied,* 414 U.S. 1091 (1973). *See generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 18.02 (1976); Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation,* 46 GEO. WASH. L. REV. 65, 86 (1977) ("federal courts look to the traditional elements of collateral estoppel when evaluating the doctrine's applicability in federal civil suits to matters administratively determined"). Courts have not hesitated to deny collateral estoppel when the party against whom it is asserted lacked adequate incentive to litigate in the first action. *See, e.g.,* Lewis v. IBM Corp., 393 F. Supp. 305, 308-09 (D. Ore. 1974) (denying employer collateral estoppel in breach of contract suit when employee in previous workmen's compensation claim had little incentive to litigate vigorously). Moreover, some flexibility is needed in the doctrine of collateral estoppel to suit the needs of administrative litigation. *See* K. DAVIS, *supra,* at § 18.03.

[59] According to one commentator:

> Federal courts have expended considerable effort in ascertaining when parties to the administrative action have had an adequate opportunity to litigate the issues before the agency. Thus, they have identified a defect in the agency factfinding process or the absence of procedural safeguards as impediments to a party's adequate opportunity to litigate his interests. . . .
>
> . . . [C]ourts have looked for factors associated with the concept of an adversarial environment. The adequacy of agency notice to affected parties, the right to counsel both in preparation for and during an agency proceeding, the right to subpoena witnesses, the right to present arguments through documentation and examination of witnesses, and the opportunity for judicial review of an agency decision are elements that help courts define the judicial character of an agency action. A summary agency proceeding or one which is purely advisory therefore will not serve as a basis for collateral estoppel.

Note, *supra* note 58, at 87-88, 89-90 (footnotes omitted). Most courts have not found the differences in evidentiary roles between administrative agencies and courts significant in considering the propriety of collateral estoppel based on an administrative determination. *See id.* at 88 n.144.

nity to present its case to the adjudicating agency, courts after *Parklane Hosiery* probably will permit private plaintiffs to rely on the administrative determinations. Thus, regardless of the forum, a prosecuting agency's power to coerce settlement is increased. Settlement, however, will not necessarily immunize all defendants from collateral estoppel; a minority of courts have held that some preclusive effect may extend even from consent decrees.[60] As the

---

[60] Most federal courts have denied collateral estoppel effect to consent decrees. *See, e.g.*, Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326-30 (1955); United States v. International Bldg. Co., 345 U.S. 502, 505-06 (1953); Kaspar Wire Works, Inc. v. Leco Eng'r & Machine, Inc., 575 F.2d 530, 537-40 (5th Cir. 1978). The *Kaspar Wire Works* court aptly summarized the arguments against according consent decrees collateral estoppel effect:

> [A] consent decree . . . is not identical in effect to the conclusion reached by a judge after a trial; thus, an appeal on the merits usually does not lie from it. The parties' proposal does not reflect the considered judgment of a judicial officer: it has been forged by them alone as an adjustment of conflicting claims and is not a tempered determination of fact and law after the annealment of an adversary trial. Depending on the temperment and the calendar of the trial judge, the decree may be subject to serious scrutiny, superficial examination, or perfunctory inspection accompanied by a hosanna because another case is off the calendar. Indeed, it appears to be the view of some members of the bar that judicial examination of the terms of a private settlement is intrusive.

Id. at 538 (footnote omitted). There is, however, authority suggesting a contrary result.

Many courts have given res judicata (claim preclusion) effect to consent decrees. *See, e.g.*, Weissinger v. United States, 423 F.2d 795, 798-800 (5th Cir. 1970) (en banc); Astron Indus. Assoc., Inc. v. Chrysler Motors Corp., 405 F.2d 958, 960-62 (5th Cir. 1968). *See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.409[5], at 1030 (2d ed. 1974). The argument for res judicata from consent decrees is certainly stronger than that for collateral estoppel: a consent decree, although extinguishing a claim, rarely involves the determinations of disputed issues. When a claim could not be determined without deciding disputed issues, however, courts may decide to grant limited collateral estoppel. Both state and federal courts have held or stated that consent decrees should receive collateral estoppel effect. *See* James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 174 n.4 (1959) (citing *inter alia* Biggio v. Magee, 272 Mass. 185, 172 N.E. 336 (1930)). After examining the reported cases, Professor James concluded that "they contain enough elasticity and conflict to permit a court either to give or to deny collateral estoppel effect to a consent judgment." *Id.* at 184. Professor Moore notes that "[a] frequent situation in which consent judgments have been held to have collateral estoppel effect occurs when two suits involve substantially the same dispute but the doctrine of res judicata fails to preclude relitigation because the second suit technically does not rest on the same cause of action as did the first." 1B MOORE'S FEDERAL PRACTICE ¶ 0.444[3], at 4012 (1974). Professor Moore goes on to note that "consent judgments are frequently given collateral estoppel effect [in cases of] patent and trademark infringement." *Id.* at 4013. Although most scholars seem opposed to granting collateral estoppel effect to consent judgments (*see id.* at 4010 n.5), some would permit it when the parties have expressed the intent to be precluded. *See id.* at 4022-23; James, *supra*, at 193; Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 227 (1954). Unfortunately, these commentators fail to clarify what kind of "intent to be bound" courts should require.

stakes in administrative proceedings escalate, defendants may mount heated defenses involving protracted discovery and procedural formalities similar to those in judicial adjudications. This conflicts with one of the primary goals of administrative proceedings—inexpensive, efficient decisionmaking.[61] Moreover, in a judicial appeal from an agency determination or a subsequent private action relying on the determination, a defeated defendant will zealously litigate the scope of the issues actually determined.[62] Administrative law judges in turn will be forced to articulate their findings precisely. Ironically, increased intensity of administrative proceedings after *Parklane Hosiery* may limit the time saved by allowing offensive use of collateral estoppel.

IV

THE SECOND HOLDING: FLEXIBLE PRESERVATION OF THE RIGHT TO JURY TRIAL

The application of collateral estoppel denied Parklane the opportunity to litigate the falsity of its proxy statement before a jury because the SEC action was a suit "in equity" for an injunction and was therefore tried to a judge.[63] Parklane argued that the seventh amendment[64] guaranteed a jury determination if it could have successfully demanded one under 1791 common law.[65] It conceded that eighteenth century courts of law recog-

---

None of this authority compels the conclusion that a court will allow collateral estoppel from a consent decree in any particular case. It does suggest, however, that at present defendants cannot be sure that settlement will eliminate all threat of collateral estoppel.

[61] *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.05, at 39-40 (1958).

[62] More vigorous litigation is not, of course, intrinsically undesirable. In its amicus brief in *Parklane Hosiery*, the SEC argued that "when the stakes of litigation increase, the parties simply have greater incentive to discover the facts and investigate the legal arguments." Amicus brief of SEC at 17. This argument has merit; vigorous advocacy should enhance truth-seeking. The hazard with heightened litigation is that a party who, for whatever reason, fails to litigate vigorously in one action may suffer adverse and disproportionately severe consequences in numerous subsequent actions.

[63] The jury right attaches where the action is for enforcement of "legal rights." Curtis v. Loether, 415 U.S. 189, 193 (1974) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 474 (1830)). An action for damages is one example. 415 U.S. at 195-96.

[64] The amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, then according to the rules of common law.

U.S. CONST. amend. VII.

[65] Petitioner's Brief at 8. Parklane's appeal focused on this argument.

nized collateral estoppel based upon prior equitable determinations,[66] but contended that they would not have applied it to a litigant in Parklane's position because they required mutuality of estoppel.[67]

The Supreme Court agreed that the " 'thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791,' "[68] and that mutuality was then a prerequisite to collateral estoppel.[69] It denied that this was an impediment to a broader rule of estoppel. " '[T]he Amendment,' " it said, " 'was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details varying even then so widely among common law jurisdictions.' "[70] Therefore, the holding necessarily implies that mutuality of estoppel is not a fundamental element of trial by jury.

Justice Rehnquist, dissenting, employed the strict historicism which the majority rejected.[71] This historicism is based on a plausible reading of precedent. Prior to *Parklane Hosiery*, the Court upheld novel procedural devices in the face of seventh amendment challenges on the ground that the device in question had a substantial equivalent at common law and thus did not reduce the jury's role.[72] The Court's invalidation of additur, which did not conform to common law practice, also supports the strict historical approach.[73]

---

[66] "[B]y the end of the eighteenth century, it appears to have heen generally agreed that determinations made in equity were binding in courts of law." Shapiro & Coquillette, *supra* note 25, at 451. Shapiro and Coquillette support this statement with several treatises that appeared during the latter half of the eighteenth century and with English and American judicial decisions from the same period. *Id.* at 452-54. In *Parklane Hosiery*, the Court acknowledged the collateral estoppel effect of equitable determinations (99 S. Ct. at 653), and petitioners did not dispute the point (Petitioner's Brief at 12).

[67] *See* note 7 and accompanying text *supra*.

[68] 99 S. Ct. at 652 (quoting Curtis v. Loether, 415 U.S. 189 (1974)).

[69] 99 S. Ct. at 655.

[70] *Id.* at 654 (quoting Galloway v. United States, 319 U.S. 372, 392 (1942)).

[71] 99 S. Ct. at 655-64. "[T]o sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment." *Id.* at 659. The irrationality of the division between law and equity bolsters this argument. There are few principles for distinguishing jury trials by reference to tbe efficacy of jury determination, thus, history is the only clear-cut test of whether a jury right should be recognized. *See* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 731 (1973).

[72] *E.g.*, Galloway v. United States, 319 U.S. 372, 392 (1942); Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935).

[73] *See* Dimick v. Schiedt, 293 U.S. 474 (1935).

Justice Rehnquist's argument, however, is unpersuasive. First, *Parklane Hosiery* may have been correctly decided even from a strictly historical viewpoint. Second, his demand for strict historicism is not supported by reason or precedent.

The assumption made by both the majority and the dissent—that in the late eighteenth and early nineteenth centuries mutuality was a requisite for estoppel—may be fallacious. The mutuality rule seemingly was dominant, but at least one notable case repudiated it. In *Whately v. Menheim,*[74] the plaintiff offered a prior equitable decree decided against the defendants as proof of a fact in issue in an assumpsit action tried to a jury, even though the plaintiff was a stranger to the prior suit. Lord Kenyon, over the defendants' objection, refused to limit the applicability of collateral estoppel by the mutuality rule:

> [The decree] was admissible and conclusive evidence of [the fact in issue and] . . . it could not be properly deemed a matter *inter alios acta,* both the defendants having been parties on the record in that suit, and it having been open to Menheim on that issue to rebut [the fact in issue] by every evidence he could offer.[75]

The result in *Parklane Hosiery* is consistent with the right to jury trial accorded the defendants by Lord Kenyon. It is arguable that a twentieth century court should not rely on *Whately* as a statement of the law of the late eighteenth and early nineteenth centuries for seventh amendment purposes the accuracy of its reporting is questionable,[76] its contemporary authoritativeness is uncertain,[77] and it clearly conflicts with the mutuality rule conven-

---

[74] 2 Esp. 608, 170 Eng. Rep. 470 (N.P. 1797).

[75] *Id.* at 609, 170 Eng. Rep. at 471. Lord Kenyon's use of the phrases "conclusive evidence" and *"inter alios acta"* indicates that he was employing collateral estoppel analysis and was not relying on evidentiary principles. *See generally* 7 J. BENTHAM, *supra* note 6, at 171, 172.

[76] Espinasse's reporting methods may be suspect. *See* 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 109-10 (1938). Espinasse did not cite the case in his treatise, *A Digest of the Law of Actions and Trials at Nisi Prius.*

[77] The contemporary reaction to *Whately* apparently was mixed. Several commentators questioned the authoritativeness of the case. *See* 2 E. COWEN & N. HILL, NOTES TO PHILLIPPS' TREATISE ON THE LAW OF EVIDENCE 824 (New York 1839); 1 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *220 n.(c); 2 *id.* at *588 n.(a). One American court chose not to follow *Whately. See* Burgess v. Lane, 3 Me. (3 Greenl.) 165 (1824).

On the other hand, some treatise writers regarded the case as authoritative precedent. *See* G. GILBERT, THE LAW OF EVIDENCE 30 (7th ed. Philadelphia 1805); 1 S. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 251 (3d ed. New York 1823). Later writers also acknowledged the case. *See* 3 R. FISHER, A DIGEST OF THE REPORTED CASES 5039 (London 1870); 1 A. FREEMAN, *supra* note 6, § 159, at 292-93. Freeman was particularly favorable:

tionally understood to prevail during this period. But *Whately* does suggest that the law on this point was not uniform, and perhaps was in flux, during the period relevant for seventh amendment inquiry. Even if it does not support the majority, the historical evidence is less conclusive against it than Justice Rehnquist assumed.

The central flaw with Justice Rehnquist's position, however, is his argument for strict historicism. The Court's application of the substantial equivalent test has often been strained.[78] Although

---

> Notwithstanding the self-evident justice and propriety of the rule that estoppels must be mutual, and that no man shall bind another by an adjudication which he is himself at liberty to disregard, instances are not rare where the rule has been denied or overlooked by courts and judges whose decisions are entitled to great respect.

Id. at 292 (discussing *Whately*). Even Starkie, who disagreed with Lord Kenyon's reasoning, cited *Whately* as good law. *See* 2 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *587-88.

It is noteworthy that his contemporaries regarded Lord Kenyon as a very able judge. *See* 4 J. CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 48-50 (1873); 8 E. FOSS, THE JUDGES OF ENGLAND 316-17 (London 1864).

[78] At least two cases, Ross v. Bernhard, 396 U.S. 531 (1970) and Galloway v. United States, 319 U.S. 372 (1943), illustrate this point.

In *Ross v. Bernhard* the Court held that a jury trial was required in a shareholder derivative action even though such actions were traditionally equitable and thus outside the seventh amendment. The Court reasoned that derivative actions were divisible into two parts: the equitable question of whether the shareholder is entitled to assert a claim on behalf of the corporation, and the underlying corporate claim. 396 U.S. at 534-35, 538. Because of the merger of law and equity the Court saw no reason to deny a jury trial on a legal corporate claim. *Id.* at 539-40. But Justice Stewart, dissenting, pointed out that the Court's conceptual division of derivative actions was alien to the common law. Historically, derivative actions were viewed as wholly equitable. 396 U.S. at 543 (dissenting opinion, Stewart, J.). Thus, in *Ross* the Court strained the historical test to its breaking point. *See* Redish, *Seventh Amendment Right to Jury Trial: A Study in Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 386, 499-501 (1975); *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 172-76 (1970); Note, *Jury Trial in a Stockholder's Derivative Suit*, 65 NW. U.L. REV. 497, 701 (1970).

In *Galloway v. United States* the Court seemed to argue that directed verdicts were permissible under the seventh amendment because two common law procedures, the motion for a new trial and the demurrer to the evidence (319 U.S. at 390), had intruded on the jury's province in a similar way. The opinion indicates that although these devices differed in detail from a directed verdict, their impact on a jury was similar enough that a directed verdict did not damage the "basic institution of the jury trial." *Id.* at 392.

This reasoning is suspect. A demurrer to the evidence is an inapposite analogy to a directed verdict because it had built-in safeguards against abuse that the directed verdict lacks. Few sane litigants would risk a demurrer to the evidence. The defendant had to wait until after the plaintiff presented his case before he could demur. By doing so he tacitly admitted that the plaintiff's evidence was true, and gambled that the judge would find it insufficient to prove the plaintiff's case. If the judge felt that the jury could reasonably have drawn any inference from the evidence that would sustain the plaintiff's position, the demurrer was doomed to failure. Where the motion did fail, judgment for the plaintiff

the Court has claimed that the practice of 1791 is the sole measure for seventh amendment inquiries, it has reached results far more progressive than this standard permits. It has approved the directed verdict,[79] summary judgment,[80] judgment n.o.v.,[81] summary bankruptcy proceedings,[82] delegation of litigation to administrative agencies,[83] and mini-juries.[84] In fact, the Court has arguably upheld every procedural change that it did not consider unwise[85] or contrary to the most fundamental meaning of the amendment.[86]

---

ensued. *See* Galloway v. United States, 319 U.S. at 390, 393 n.28; Comment, 44 MICH. L. REV. 468, 470-72 (1945). No such sanction attaches to the failure of a motion for a directed verdict. *See* FED. R. CIV. P. 50a.

The value of defendant's right to demur to the evidence was so tenuous that one addition to the burden a demurrer imposed made it almost worthless. In Gibson v. Hunter, 2 H. Bl. 187, 126 Eng. Rep. 499 (H.L. 1793), the House of Lords held that "the demurrant was required ... to state the facts which the evidence tended to prove and formally admit them to be true." Comment, *supra,* at 473. After this decision, "no case involving [use of a demurrer to the evidence] appears in the English reports." *Id.*

Motions for a directed verdict pose a much greater threat to the jury trial right than the demurrer to the evidence. Because a litigant can request a directed verdict without risk, judges may direct a verdict in many marginal cases where the defendant would never have demurred. The demurrer to the evidence does not substantially equate with the directed verdict.

Nor did the common law motion for new trial intrude upon the province of the jury in the same way as the modern directed verdict. A successful motion for new trial substituted one jury for another; the directed verdict displaces the jury with the judge. Thus, the *Galloway* Court offered no convincing analogue to the directed verdict.

The Court also mentioned eighteenth century directed verdict practice but suggested that "there is no reason to believe that the motion at that time even approximated in character the present directed verdict." 319 U.S. at 391 n.23. One commentator has presented historical evidence showing that "[i]n the England of 1790 the phrase 'to direct a verdict' was common," that judges frequently instructed the jury that one party was entitled to the verdict, and that such instructions bound the jury. *See* Henderson, *The Background of the Seventh Amendment,* 80 HARV. L. REV. 289, 302-03 (1966). This evidence suggests that the common law directed verdict was substantially equivalent to the modern device.

[79] Galloway v. United States, 319 U.S. 372, 392 (1943).

[80] Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902). *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 219-20 (2d ed. 1977).

[81] Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935) (judge reserved question of sufficiency of evidence prior to entry of verdict). *But see* Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913) (judge entered judgment n.o.v. without reserving question of sufficiency). *See generally* F. JAMES & G. HAZARD, *supra* note 80, at 340-41.

[82] Katchen v. Landy, 382 U.S. 323 (1966). *See* Redish, *supra* note 78, at 522.

[83] Atlas Roofing v. OSHA, 430 U.S. 442 (1977); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). *See* Redish, *supra* note 78, at 518-21.

[84] Colgrove v. Battin, 413 U.S. 149 (1973).

[85] Additur was held unconstitutional in Dimick v. Schiedt, 293 U.S. 474 (1934). *See generally* F. JAMES & G. HAZARD, *supra* note 80, at 332-34.

[86] Curtis v. Loether, 415 U.S. 189, 193 (1974). *See* note 105 and accompanying text *infra.*

This pattern is not surprising; strict historicism is certainly inconvenient. Eighteenth century procedure does not necessarily achieve quick and correct resolution of legal disputes, and adhering to it may limit the effectiveness of litigation as a system for dispensing justice. Certain aspects of common law procedure were always ill suited to their task, because their roots were in historical development rather than practicality. Others have become outmoded because joinder,[87] discovery,[88] and the merger of law and equity[89] have transformed litigation from a fight into a war.[90] Commentators have attacked the jury trial mechanism itself as inappropriate to certain kinds of modern lawsuits.[91] This problem manifests itself most acutely in the "big case," where issues can be so difficult and the conventional methods of presentation so cumbersome that the process cannot yield a rational result.[92] The value of adapting the rules for conducting litigation in response to changing circumstances is obvious. Finally, the difficulty of conducting a rigorous historical investigation for each new seventh amendment question, and the frequently inconclusive or doubtful results obtained by such inquiries, should not be overlooked.[93]

Thus, the *Parklane Hosiery* Court's decision is sensible policy and a plausible extrapolation from previous cases. More significantly, a flexible interpretation of the seventh amendment is almost certainly more correct than a rigid interpretation. The text of the amendment—"[i]n suits at common law, . . . the right of trial by jury shall be preserved"—poses no barrier to this interpretation, although it is superficially problematic. "Preserve" does permit a

---

[87] FED. R. CIV. P. 18.

[88] FED. R. CIV. P. 26.

[89] FED. R. CIV. P. 2.

[90] For a discussion of the effects of procedural changes, particularly the law-equity merger, on modern litigation and seventh amendment issues, see McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1 (1967).

[91] *See e.g.*, Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979); Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1977).

[92] *See* Note, *supra* note 91, 92 HARV. L. REV. at 898-99.

[93] Both the court and leading commentators on the history of the seventh amendment have regularly remarked on this. *See, e.g.*, Galloway v. United States, 319 U.S. 372, 388-92 (1943); Henderson, *supra* note 78, at 335-37; Shapiro & Coquillette, *supra* note 25, at 448-50; Wolfram, *supra* note 71, at 652-53. As an illustration of the uncertainty inherent in historical seventh amendment inquiries, see the debate in Shapiro & Coquillette, *supra* note 25; Chesnin & Hazard, *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 8 YALE L.J. 999 (1974); Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620 (1974).

rigid historical reading and "[i]n suits at common law" might suggest that such a reading is appropriate. But "preserve" need not imply that change is excluded, as Professor Wolfram has demonstrated.[94] Moreover, "[i]n suits at common law" does not add to the rigid meaning of "preserved." Standing by itself, the phrase does provoke questions. If the amendment incorporated the common law, where does the authority to abandon part of the common law come from? Would not a more general statement, such as "the right to trial by jury shall be preserved," better serve an intent to create a malleable standard?

The amendment's historical context answers these questions. The common law was not static; it was a dynamic process for resolving disputes fairly. Decisions on appropriate procedure are not invalid because they were reached after 1791.[95] More significantly, the purpose behind the reference to common law was to pattern the federal right to a civil jury on the shared tradition of the English common law, rather than on the law of the forum state. The reaction to early proposals for a jury trial clause requiring reference to state law[96] demonstrates this purpose. Some of the Framers were concerned about a heterogeneous jury right within a single court system.[97] Others objected to the breadth of

---

[94] *See* Wolfram, *supra* note 71, at 735-36.

[95] *See id.* at 736.

[96] The first jury right proposal was that "trial by jury shall be preserved as usual in civil cases." 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 628 (1911). This proposal was made on September 15, 1787, during the closing days of the constitutional convention, by Mr. Pinckney of South Carolina and Mr. Gerry of Massachusetts. "Trial by jury shall be as heretofore" was proposed by the defeated Pennsylvania anti-federalist minority in December of 1787. *See* THE FEDERALIST No. 83 (A. Hamilton), at 567 (J. Cooke ed. 1961); 1 J. GOEBELS, THE HISTORY OF THE SUPREME COURT, ANTECEDENTS AND BEGINNINGS TO 1801, at 332-37 (1971). A similar provision was suggested in North Carolina. *See* 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 155 (2d ed. Philadelphia 1859) (by Mr. Spencer).

[97] The capricious operation of ... [a] ... dissimilar ... method of trial in the same cases, under the same government, is of itself sufficient to indispose every well-regulated judgment towards it. Whether the cause should be tried with or without a jury would depend, in a great number of cases, on the accidental situation of the court and parties.

THE FEDERALIST No. 83 (A. Hamilton), at 567-68 (J. Cooke ed. 1961).

Had it, then, been inserted in the Constitution, that the trial by jury should be as it had been heretofore, there would have been an example, for the first time in the world, of a judiciary belonging to the same government being different in different parts of the same country. What would you think of an act of Assembly which should require the trial by jury to be had in one mode in the county of Orange, and in another mode in Granville, and in a manner different from both in Chatham? Such an act of Assembly, so manifestly injudicious, impolitic, and unjust, would be repealed next year.

the right to jury trial in some of the states.[98] If the phrase "[i]n suits at common law" is read as an attempt to obviate these concerns, it designates only the right that the amendment protects; it does not indicate that the right is immutable.[99]

Other aspects of the seventh amendment's history also support a flexible interpretation. Common sense suggests that the Framers did not intend to bind us to eighteenth century procedure forever, and the historical record bears this out. James Madison's original bill declared that trial by jury "ought to remain inviolate."[100] As a substitute for "inviolate," "preserve" suggests

---

> But what would you say of our Constitution, if it authorized such an absurdity? The mischief, then, could not be removed without altering the Constitution itself. It must he evident, therefore, that the addition contended for would have not answered the purpose.

4 J. ELLIOT, *supra* note 96, at 165 (James Iredell).

[98] Hamilton, in *The Federalist*, objected to the possible effect of incorporating state law because he considered unwise the laws of some states extending the jury right to all cases, including cases such as those in admiralty that affect foreign relations. THE FEDERALIST No. 83 (A. Hamilton), at 568-69 (J. Cooke ed. 1961). Governor Randolph of Virginia seems to have expressed a similar concern in the Virginia convention. 3 J. ELLIOT, *supra* note 96, at 468-69.

[99] Professor Wolfram, who has done the most complete job of compiling historical sources for understanding the seventh amendment, and upon whom we rely heavily, disagrees with the proposition that the Framers abandoned the incorporation theory for state law. Wolfram, *supra* note 71, at 712-20. He relies in large part upon *The Federalist* No. 83 which seems to interpret the Massachusetts proposal ("In civil actions between Citizens of different States every issue of fact arising in Actions at common law shall he tried by a jury if the parties or either of them request it." 2 BUREAU OF LIBRARY AND ROLLS, DOCUMENTARY HISTORY OF THE CONSTITUTION 95 (1894)), to incorporate state law. *See generally* THE FEDERALIST No. 83 (A. Hamilton), at 506-07 (J. Cooke ed. 1961). It probably did, although perhaps Hamilton was merely making the point that general "common law" was understood differently in the various states. He may also have been mistaken or overreaching his argument. Wolfram says that there is little reason to believe that the "common law" referred to in some state proposals and the final language of the amendment was the common heritage of English law. Wolfram, *supra* note 71, at 720-22. We disagree, and not just because Justice Story said the law of England was intended. *See* United States v. Wonson, 28 F. Cas. 745, 750 (No. 16,750) (C.C.D. Mass. 1812). As mentioned above, many were concerned that some states were too generous with the jury right. Mandatory diversity of practice also created concern. Less ambiguous language was available to accomplish the end of incorporating state law. It is significant that the anti-federalist opposition invented the various jury trial provisions, including the one referring to the common law. Because they were seeking to establish that theirs was a campaign of principle, language of principle best suited their purposes. Wolfram, *supra* note 71, at 668. The venerable English right was a far better candidate for inalienability than the mixed bag of state practices. It is hard to imagine that for a generation versed in Blackstone, "common law" did not bring to mind "the" common law.

[100] 1 ANNALS OF CONG. 435 (Gales & Seaton eds. 1789) (print bearing running title "History of Congress.").

flexibility. Moreover, during the debates a number of its opponents argued that a jury trial amendment would prevent reanalysis of the efficacy of jury trial in particular cases.[101] No one seems to have urged that freezing the jury right was necessary. The amendment was passed in spite of a fear that it would freeze procedure and with the apparent understanding that it would not do so. A rigid interpretation realizes the fear of some of the Framers without furthering the goals of any.

Although the Court's flexible interpretation is historically sound, Justice Rehnquist objected, with some justification, that it is too vague to suffice as a legal standard: to admit that a procedural change can be implemented that diminishes the function of the jury "would effectively permit judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated 'procedural reform.' "[102]

The fundamental elements test invites this criticism. Some procedural devices may clearly fall inside or outside this standard, but without judicial gloss "fundamental element" is amorphous. The standard lacks criteria for isolating "elements" of the jury trial right or identifying those that are "fundamental." Consider, for example, the issue the Court faced in *Parklane Hosiery*. If the

---

[101] The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. . . . The examples of innovatious which contract its ancient limits as well in these States as in Great Britain afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature.

THE FEDERALIST No. 83 (A. Hamilton), at 573 (J. Cooke ed. 1961).

The *trial by jury* is held as sacred in England as in America. There are deviations from it in England; yet greater deviations have happened here, since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary. It must be, therefore, left to the discretion of the legislature to modify it according to circumstances.

3 J. ELLIOT, *supra* note 96, at 537 (James Madison in the Virginia Convention) (emphasis in original). *See also* 2 *id.* at 517 (James Wilson at the Pennsylvania ratification convention); Wolfram, *supra* note 71, at 664 n.68.

[102] 99 S. Ct. at 659.

Court had framed the problem in terms of the defendants' right to get the proxy statement issue before the jury, it would have been a strong candidate for fundamental element status. Characterizing the issue in terms of the mutuality rule, however, prompted the opposite result. The standard provides no firm guidance in analyzing seventh amendment problems and results in decision-making by characterization.

The argument that the seventh amendment is supple depends heavily on the unreasonableness of a rigid interpretation. The amendment should therefore be bent only so far as sound reasons allow. Instead of the conclusory methodology it now employs, the Court should develop criteria for directly assessing the wisdom of the jury trial requirement in particular cases. It should determine what reasons are adequate to deny or limit trial by jury and, conversely, what reasons justify requiring jury trial despite strong countervailing arguments or a traditional dedication of the matter to the judge. Because the results of this analysis should deviate from history and precedent only for good cause, the rule is not formless and dangerous, as Justice Rehnquist might fear.

Furthermore, the Supreme Court's seventh amendment cases upon rereading can provide guidance in this inquiry. They suggest some considerations that may justify dispensing with a jury. A strong need to expeditiously adjudicate certain claims may suffice,[103] and procedural devices which dispose of nonmeritorious claims efficiently without divesting the jury of its traditional function should be allowed.[104] But abandoning trial by jury in

---

[103] In Katchen v. Landy, 382 U.S. 323 (1966), the Supreme Court upheld a summary bankruptcy proceeding against a seventh amendment challenge, noting that one purpose of the revisions to the federal bankruptcy laws was to make their administration more efficient. Congress intended to provide for the prompt, and effective settlement of bankrupts' estates. *Id.* at 328-29.

For another example, see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). There, the Court upheld the NLRB's authority to order reinstatement of workers unlawfully discharged and to direct payment of back wages. The basis of this decision was ostensibly that the back pay awards were incidental to equitable relief, even though damages might have been recovered in an action at law. *Id.* at 48. Subsequently, however, the Supreme Court said *Jones & Laughlin* "stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." Curtis v. Loether, 415 U.S. 189, 194 (1974) (footnote omitted).

[104] Upholding another summary judgment provision, the Court in Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902) said:

> If it were true that the rule deprived the plaintiff in error of the *right* of trial

civil rights actions to avoid biased community sentiment undermines too deeply the jury's role.[105]

Under this analysis, the Court's decision to estop Parklane was correct. The decision has some historical basis; the law courts of 1791 gave preclusive effect to equitable determinations whenever the doctrine of estoppel applied. Fewer issues will go to the jury because the doctrine has expanded. The reasons to allow this expansion, however, are substantial. Relitigation is expensive, time consuming, potentially embarrassing to the legal system because of the possibility of inconsistent results, and ordinarily pointless because the facts were probably found correctly the first time. Moreover, there was little need for the calculated irrationality of the jury in *Parklane Hosiery*. Securities litigation rarely requires the intervention of community sentiment and values to mitigate the results of harsh legislation or to judge cases involving inarticulable standards. Where the jury has a special role, judges should refuse to apply collateral estoppel absent mutuality to equitable decisions, either as a matter of constitutional law or as an exercise of judicial discretion. *Parklane Hosiery* was not such a case.

CONCLUSION

In *Parklane Hosiery Co. v. Shore* the Supreme Court, hammering the last nail in the coffin of the ancient doctrine of mutuality of estoppel, held that private securities plaintiffs may rely on is-

---

> by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleadings as a means to delay the recovery of just demands.

Id. at 320 (emphasis in original).

[105] *See* Curtis v. Loether, 415 U.S. 189 (1974), where a black woman brought an action under § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612, which authorizes private plaintiffs to bring civil actions to remedy violations of Title VIII. The district court held that a jury trial was neither authorized by Title VIII nor required by the seventh amendment. The court of appeals reversed on both grounds. The Supreme Court affirmed the reversal stating that *Katchen v. Landy* and *Jones & Laughlin*

> uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights in an ordinary action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

Id. at 195.

sues determined in a SEC injunctive proceeding. Although the case is part of a long-term trend toward broad application of collateral estoppel, it may give the SEC and other administrative agencies unprecedented power to coerce defendants into settling enforcement suits before trial. In addition, defendants choosing to contest agency charges, fearing the preclusive effects of adverse findings, may litigate with tenacity sufficient to rob administrative proceedings of their characteristic flexibility.

Regardless of the practical consequences flowing from the offensive use of collateral estoppel, its application in *Parklane Hosiery* threatened to deprive the defendants of their seventh amendment right to jury trial. Although the Court assumed that the mutuality rule would have precluded estoppel at the time of the ratification of the seventh amendment, it held that the amendment did not require mutuality. The Court's holding was sound, possibly even from the viewpoint of strict historicism. One case from the late eighteenth century casts doubt on the validity of the Court's assumption. A flexible interpretation of the seventh amendment seems more appropriate than a rigid historical reading, however. *Parklane Hosiery* comports with prior Supreme Court cases that have upheld the constitutionality of procedural devices diminishing the jury's historic role. The language and history of the seventh amendment indicate that its Framers did not intend to foreclose introduction of procedural devices that expedite litigation without directly undermining the jury's role as primary factfinder. The deficiency in the decision is its failure to provide focused criteria for application of the seventh amendment. The Court should adopt a test reflective of the flexibility and policies of the amendment.

*James G. Hazard**
Jonathan C. Thau
Donald Arthur Winslow

---

*Member, Cornell Law School Class of 1979.